IN THE

Supreme Court of the United States

October Term, 1971

No. ....

71-942

ANTHONY OZZANTO and BERNARD POZNER,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,

Respondents,

THE PEOPLE OF THE STATE OF CALIFORNIA BY THEIR ATTORNEY, JOSEPH P. BUSCH, JR., DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,

Real Party in Interest.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

ALVIN HIRSCH,
9171 Wilshire Boulevard,
Beverly Hills, Calif. 90210,
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Respondents,

THE PEOPLE OF THE STATE OF CALIFORNIA BY THEIR ATTORNEY, JOSEPH P. BUSCH, JR., DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,

Real Party in Interest.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Anthony Ozzanto and Bernard Pozner, Petitioners, pray that a Writ of Certiorari issue to review the Judgment of the Court of Appeal of the State of California, Second Appellate District, entered in this case on October 29, 1971.

Opinion Below.

The denial of Petition for Hearing by the Supreme Court of California (Appendix A, *infra*, p. 1) is not reported. The Order of the Court of Appeal of the State of California (Appendix B, *infra*, p. 2) is not reported. No written opinion was issued. The Order of the Superior Court of the State of California is not

reported, and is contained in the Transcript of Hearing in Superior Court on Motion No. A 272820, at page 25, lines 12-13 and page 126, line 19, through page 127, line 9.

Jurisdiction.

The Order of the Court of Appeal of the State of California, Second Appellate District (Appendix B, *infra,* p. 2) was entered on October 29, 1971. Hearing was sought in the Supreme Court of the State of California, and was denied on November 24, 1971 (Appendix A, *infra,* p. 1). The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257(3).

Questions Presented for Review.

1. Whether evidence must be suppressed if it has been seized as the result of a warrantless search of an automobile driven by the Petitioners and impounded by Police at the time of Petitioners' arrest; said search having been conducted after Petitioners had been arrested, driven to the Police Station, and booked.

2. Whether an indictment must be dismissed insofar as it is based upon evidence seized in violation of an accused's rights under the Fourth Amendment to the United States Constitution.

Constitutional Provision and Statutes Involved.

1. The Fourth Amendment, United States Constitution,

2. The statutes under which Petitioners were indicted, though nothing turns on their terms, are the following Sections of the California Penal Code:

Section 487. Grand Theft Defined

"Grand theft is theft committed in any of the following cases:

1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ($200); provided, that when domestic fowls, avocados, olives, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars ($50); provided, further, that where the money, labor, real or personal property is taken by a servant, agent or employee from his principal or employer and aggregates two hundred dollars ($200) or more in any 12 consecutive month period, then the same shall constitute grand theft.

2. When the property is taken from the person of another.

3. When the property taken is an automobile, firearm, horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow or pig."

Section 459. Definition

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary."

Conspiracy Section 182. Definition: punishment; venue.

"If two or more persons conspire:

1. To commit any crime.

. . .

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by imprisonment in the state prison for not less than 10 years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit such felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term."

3. The statutes under which Petitioners sought post-indictment relief are the following Sections of the California Penal Code:

Section 995. Cases in which indictment or information must be set aside

"The indictment or information must be set aside by the court in which the defendant is

arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicted without reasonable or probable cause."

Section 999a. Writ of prohibition; time for filing petition; grounds; service; time for issuance of alternative writ

"A petition for a writ of prohibition, predicated upon the ground that the indictment was found without reasonable or probable cause or that the defendant has been committed on an information without reasonable or probable cause, must be filed in the appellate court within 15 days after a motion made under Section 995 of the code to set aside the indictment on the ground that the defendant has been indicted without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, has been denied by the trial court. A copy of such petition shall be served upon the district attorney of the county in which the indictment is returned or the information is filed. The alternative writ shall not issue until five days after the service of notice upon the district attorney and until he has had an opportunity to appear before the appellate court and to indicate to the court the particulars in which the evidence is sufficient to sustain the indictment or commitment."

Section 1538.5. Motion to return property or suppress evidence

"(a) Grounds. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that:

(1) The search or seizure without a warrant was unreasonable; or

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtaned is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

. . . .

(f) Felony; motion at preliminary hearing. If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

. . . .

(i). Felony; renewal of motion at special hearing; review. If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing. or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a spe-

cial hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing."

Statement.

The facts necessary to an understanding of the questions now raised are as follows:

A. Course of Proceedings in the Section 955 and Section 1538.5 Proceedings Now Before This Court.

On February 3, 1971, Petitioners were arrested in the City of Glendale, County of Los Angeles, State of California. The complaint issued upon arrest was dismissed on May 18, 1971.

On May 5, 1971, an Indictment was filed in the Superior Court of the State of California, for the County of Los Angeles, entitled *People v. Anthony Ozzanto and Bernard Pozner*, Case No. A272820 (Appendix C, *infra*, p. 3) charging Petitioners with the following violations:

(a) Violation of Section 182.1 of the California Penal Code (Conspiracy). Count I of the Indictment.

(b) Violations of Section 487(1) of the California Penal Code (Grand Theft). Counts II and IV of the Indictment.

(c) Violations of Section 459 of the California Penal Code (Burglary). Counts III and V of the Indictment.

(d) Violation of Sections 664 and 487(1) of the California Penal Code (Attempted Grand Theft). Count VI of the Indictment.

(e) Violation of Sections 664 and 459 of the California Penal Code (Attempted Burglary). Count VII of the Indictment.

On June 10, 1971, Petitioners, represented by Counsel, were arraigned before the Superior Court of the State of California. At the arraignment, Petitioners moved the Court to set aside each Count of the Indictment on the grounds set forth in Section 995 of the California Penal Code: that is, that Petitioners had been indicted without reasonable or probable cause because illegally seized evidence had been used as evidence before the grand jury. Petitioners further moved the Court to supress all evidence obtained as the result of a search of Petitioners' persons and of the automobile which they were driving at the time of their arrest. Said motion was made under Section 1538.5 of the California Penal Code on the grounds that said evidence was illegally obtained as the result of an unreasonable search and seizure in violation of Petitioners' rights under the Fourth Amendment to the United States Constitution. The motion under Section 995 was also submitted in writing on or about July 22, 1971 (Appendix D, *infra*, p. 10).

Hearings on both motions were held on September 20, 1971, before the Superior Court and that Court, on September 20, 1971, denied both motions. [Transcript of Hearing on 1538.5 and 995 Motions—Superior Court of the State of California. p. 25, lines 12-13; p. 126, line 19; to p. 127, line 9].*

On October 4, 1971, Petitioners filed, in the Court of Appeal of the State of California, Second Appellate District, a Petition for a Writ of Prohibition, or in the alternative, for a Writ of Mandate. The Petition was based on the same grounds as the Motions in the Superior Court. Said Petition was numbered 2nd Civil 39178. A certifed copy of said Petition has been transmitted to this Court herewith.

On October 29, 1971, said Petition was denied as to both Writs. No written opinion was given.

On November 5, 1971, a Petition for Hearing was filed in the Supreme Court of the State of California, and was denied on November 24, 1971, without written opinion. A certified copy of said Petition has been transmitted to this Court herewith.

B. Relevant Facts Concerning the Underlying Arrest and Indictment of Petitioners.

The relevant facts are contained in Petitioners' Petition for a Writ of Prohibition or, in the alternative, for a Writ of Mandate in the Court of Appeal of the State of California [Court of Appeal Motion, p. 13, line 8, to p. 16, line 10; p. 18, line 10, to p. 20, line 28].

*All references to "Superior Court Transcript" which follow, are to the Transcript of Hearing on Petitioners' Motion in the Superior Court of the State of California, for the County of Los Angeles, Department 108; September 20, 1971. A certified copy of said transcript has been transmitted to this Court herewith.

On February 3, 1971, Petitioners were arrested for auto theft and auto burglary. The Complaint on those counts was later dismissed.

At the time and place of arrest, the persons of Petitioners were searched for weapons and none were found [Superior Court Transcript, p. 53, lines 11-23].

The 1964 black Ford which Petitioners had been driving was also searched at the scene, and nothing was found inside the car, the glove compartment or the trunk [Grand Jury Transcript, p. 55, lines 26-28].*

At the same time, an officer took from Petitioner Pozner, some keys to a Chrysler which the Petitioner stated belonged to a Chrysler that he owned [Grand Jury Transcript, p. 54, lines 15-25]. The officer tried to open the trunk of a Chrysler belonging to one Philip Feldstein, who had complained that Petitioners had been following him. The keys did not open the trunk of Feldstein's car, [Grand Jury Transcript, p. 55, lines 8-16], and there was no evidence that any attempt had been made to enter Feldstein's car [Superior Court Transcript, p. 113, lines 10-25]. Nevertheless, Petitioners were charged with auto burglary of Mr. Feldstein's car [Superior Court Transcript, p. 77, lines 5-12].

The officers also questioned Petitioners as to the ownership of the 1964 black Ford which they had been driving. Petitioner Pozner told the officers that it belonged to one Josephine Knack of Hayworth, Cali-

*All references to "Grand Jury Transcript" which follow, are to the Transcript of Grand Jury Proceedings, dated May 5, 1971, Grand Jury of the County of Los Angeles, State of California. A certified copy of said Transcript has been transmitted to this Court herewith.

fornia, although Petitioners did not produce a registration to the car. A police radio report confirmed that the car did belong to the woman named and that it had not been reported stolen [Grand Jury Transcript, p. 31, lines 9-21; p. 37, lines 15-21; Superior Court Transcript, p. 31, lines 13-28; p. 90, line 22, to p. 91, line 10]. Petitioners were charged, however, with auto theft of the black Ford [Superior Court Transcript, p. 43, lines 14-17].

The black Ford was then driven by a police officer to the police station approximately six blocks from the scene of arrest [Superior Court Transcript, p. 78, lines 6-13]. Petitioners were handcuffed and driven to the Police Station [Superior Court Transcript, p. 95, lines 7-13].

The Petitioners were booked, and after booking, a police officer searched the impounded auto. The search took between one half hour to four hours to complete. [Superior Court Transcript, p. 97, lines 16-28; p. 98, lines 1-24; p. 101, lines 19-25; pp. 105, and 106].

The District Attorney stipulated that no warrant had been issued for Petitioners arrest and that no search warrant was ever issued [Superior Court Transcript, p. 25, lines 23-27]. Furthermore, the officer, who conducted the search, testified that the search was made in order to find evidence and contraband [Superior Court Transcript, p. 98, lines 6-24]. The same officer also testified that he did not consider applying for a search warrant even though a magistrate was available and no emergency existed [Superior Court Transcript, p. 110, lines 13-23].

As the result of the search of the auto, a metal box and shopping bag containing tools and a large number

of keys were found in a secret compartment under the back seat [Superior Court Transcript, p. 87, lines 6-10 and 18-25; p. 88, lines 1-9].

The evidence so found was then introduced in evidence before a grand jury which indicted Petitioners of Burglary, Grand Theft, Conspiracy, Attempted Grand Theft and Attempted Burglary. As to each count, the evidence was as follows:

1. Burglary: (Count III): The only evidence introduced to link Petitioners to the Burglary of the auto of one Azicare, was the fact that one of the keys found in the post-arrest search of the impounded black Ford, fit an auto belonging to Azicare. Azicare had been burglarized on May 12, 1970 [Grand Jury Transcript, p. 138, line 24, to p. 139, line 4].

2. Burglary: (Count V): Parking lot attendants testified that on November 24, 1970, Petitioners had parked their car in a lot where a car belonging to one Chantillon had already been parked. They also testified that Petitioners had left the lot before Chantillon, but that they did not see Petitioners approach Chantillon's auto or remove anything from it. Chantillon's car was burglarized that same day [Grand Jury Transcript, p. 120, line 17, to p. 124, line 19; p. 126, line 19, to p. 130, line 12].

3. Attempted Burglary: (Count VII): One Judis testified that two weeks before his car was burglarized, he saw (from a second story window some distance from his car) a man, who resembled Petitioner Pozner, looking at Judis' car [Grand Jury Transcript, p. 96, line 26, to p.

98, line 26]. There was also testimony that one of the keys found in the post-arrest search, fit Judis' car [Grand Jury Transcript, p. 137, line 23, to p. 138, line 1].

4. Conspiracy to Commit Grand Theft and Burglary: (Count I): There was evidence that Petitioners possessed keys which fit the Judis and Azicare autos. Those keys were found in the post-arrest search [Grand Jury Transcript, p. 137, line 13, to p. 139, line 4]. There was also evidence that Petitioner possessed other keys and tools found in the post-arrest search [Grand Jury Transcript, p. 58, line 20, to p. 59, line 1]. Testimony was given that on February 3, 1971, Petitioners followed a jewelry salesman (one Philip Feldstein) from one jewelry store to the vicinty of a second jewelry store where they got out of their auto, but made no attempt to enter Feldstein's Chrysler. It was testified that Petitioner Pozner had a key to a Chrysler which fit into the trunk lock of Feldstein's car but would not open it [Grand Jury Transcript, p. 15, line 1, to p. 23, line 4; p. 55, lines 8-16; p. 56, lines 21-24].

5. Grand Theft: (Count II): The same evidence cited above as the basis for indictment on Count III was the basis for indictment on this Count.

6. Grand Theft: (Count IV): The same evidence cited above as the basis for Count V was the basis for indictment on this Count.

7. Attempted Grand Theft: (Count VI): The same evidence cited above as the basis for Count VII was the basis for indictment on this Count.

REASONS FOR GRANTING THE WRIT.

A. The Court of Appeal of the State of California Has Decided a Federal Question in a Way in Conflict With the Applicable Decisions of This Court.

This is an illegal search and seizure case. At the time of Petitioners' arrest, this Court had previously held that there must be compelling reasons and exceptional circumstances to justify a search in the absence of a search warrant. *McDonald v. United States,* 335 U.S. 339. The right does exist to make a contemporaneous search without a warrant upon lawful arrest in order to search for weapons and for fruits or implements of the crime. *Weeks v. United States,* 232 U.S. 383. This right to search and seize without warrant extends to things under an arrested person's control, and, to an extent depending upon the circumstances of the arrest, to the place of arrest. *Agnello v. United States,* 269 U.S. 20.

But these justifications for a warrantless search are absent where a search is remote in time or place from the arrest. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest". *Preston v. United States,* 376 U.S. 364, 368. In such circumstances, search and seizure without a warrant is not permitted. *Coolidge v. New Hampshire,* 403 U.S. 443.

Only after Petitioners' arrest was the auto searched for the admitted purpose of discovering evidence of crime, and the evidence found, as the result of the search, was presented to the grand jury.

Therefore, the decision of the Court of Appeal of the State of California, upholding the Superior Court's refusal to suppress all evidence seized in this post-arrest

search, was clearly contrary to the applicable decisions of this Court. A state court should not be permitted to so ignore the decisions of this Court, or else the protection of an accused, so carefully established by this Court, will be meaningless. Petitioners will be required to stand trial and (if convicted on the basis of illegal evidence) appeal once more through the appeals courts of California where, under California law, they would then go through a full hearing once more on the same issues presented herein. *People v. Conley*, Court of Appeal, Fourth District, Second Division, State of California, filed December 7, 1971. To require such an expensive and protracted course of proceedings would cause great difficulties for Petitioners and subject them, needlessly, to possible convictions. This Court should grant the Writ and decide the issue now.

B. The Court of Appeal of the State of California Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The Court of Appeal refused to grant a Writ of Prohibition dismissing the indictment. The indictment, on one count, was based entirely upon the evidence seized from Petitioners' auto after Petitioners' arrest and booking. On the remaining six counts, evidence so seized was a major portion of the evidence.

This Court has held that a defendant may be required to stand trial where only hearsay evidence is the basis of his indictment. *Costello v. United States*, 350 U.S. 359. Furthermore, this Court will not overturn a lower court decision refusing a full-dress preliminary hearing to test a defendant's mere suspicion that self-incriminatory evidence might have been used in an in-

dictment of defendant. *Lawn v. United States,* 355 U.S. 339.

But in this case, there is no doubt that evidence seized in the post-arrest search was used in evidence before the grand jury. Petitioner does not now request a hearing on the issue of whether the seized keys and tools were presented to the grand jury as did the defendant in the *Lawn* case (*supra*). Nor are Petitioners dealing with merely incompetent evidence, as in the *Costello* case (*supra*), but with illegally seized evidence.

The case of *United States v. Blue,* 384 U.S. 251, treated the question of whether an indictment should be dismissed if based on "tainted evidence", but the Petitioner in that case apparently did not even contend that "tainted" evidence was actually presented to the grand jury which indicted him. *United States v. Blue,* 384 U.S. 251, page 255, Note 3. Therefore, this Court has not actually decided a case wherein illegally seized evidence has been presented to an indicting grand jury. We urge the Court to do so now.

Conclusion.

The action of the California courts, insofar as it regards Petitioners' Motion to suppress evidence, is a unique departure from the clearly established law that a warrantless search and seizure may not be conducted after a Defendant has been arrested and booked and his auto has been impounded in a police lot remote from the scene of arrest. Such a clear disregard for this Court's carefully articulated protections against unreasonable searches and seizures should not be allowed to stand.

Furthermore, the decision below not to dismiss the indictment is based upon the principle that illegally seized evidence may be the basis of an indictment. The Court should clearly establish whether or not illegally seized evidence may be used to indict.

If Petitioners' constitutional rights have been violated, they should not be put to the expense and anxiety of a protracted series of hearings and appeals, nor should they be subjected to the possibility of an illegally obtained conviction. This Court should decide these issues now.

The Writ of Certiorari should be granted.

Respectfully submitted,

ALVIN HIRSCH,
Counsel for Petitioners.

APPENDIX A.

Clerk's Office Supreme Court, 4250 State Building, San Francisco, California 94102.

Nov. 24, 1971.

Dear Sir: I have this day filed Order Hearing Denied.

In re: 2 Civ. No. 39178, Anthony Ozzanto & Bernard Pozner vs. Superior Ct. L.A. Co.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX B.

Los Angeles, Cal. Oct. 29, 1971

TITLE:

Ozzanto, et al. vs. Superior Court No. 39178.

THE COURT:

Petition for writ of prohibition/mandate denied.

Clay Robbins, *Clerk*

APPENDIX C.

Indictment. Vio. Sec. 182.1 P.C., CT. I, Vio. Sec. 487.1 P.C., CTS. II & IV, Vio. Sec. 459 P.C., CTS. III & V, Attempted Grand Theft, CT. VI, Attempted Burglary, CT, VII.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, v. Anthony Ozzanto, Bernard Pozner, Defendant. Case No. A272820.

The said Anthony Ozzanto and Bernard Pozner are accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Criminal Conspiracy in violation of Section 182.1, Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

That on or about and between the 1st day of May, 1970 and the 3rd day of February, 1971, at and in the County of Los Angeles, State of California, the said defendants, Anthony Ozzanto and Bernard Pozner did willfully, unlawfully and feloniously conspire, combine and agree together to commit the crimes of Grand Theft and Burglary in Violation of Sections 484, 487.1 and 459 Penal Code, State of California.

That thereafter at and in the County of Los Angeles and pursuant to the objects of said conspiracy the defendants did commit the following Overt Acts:

OVERT ACT NO. I

That between the dates of May 12, 1970, and February 3, 1971, the defendants ANTHONY OZZANTO and BERNARD POZNER did possess a certain key fitting a 1968 Ford, license No. WVC 955.

OVERT ACT NO. II

That during the month of November, 1970, defendant BERNARD POZNER was present at and in the vicinity of the residence of Harry Judis at 1135 South Holt, Los Angeles.

OVERT ACT NO. III

That between the dates of November 1, 1970, and February 3, 1971, the defendants ANTHONY OZZANTO and BERNARD POZNER did possess a certain key fitting a 1970 Cadillac, license no. ANO 698.

OVERT ACT NO. IV

That on or about November 24, 1970, the defendants ANTHONY OZZANTO and BERNARD POZNER, were present at and in the vicinity of 9107 Wilshire Boulevard, in the County of Los Angeles.

OVERT ACT NO. V

That on February 3, 1971, the defendant ANTHONY OZZANTO was present at and in the vicinity of Loman's Jewelers at 14522 Ventura Boulevard, Sherman Oaks.

OVERT ACT NO. VI

That thereafter on February 3, 1971, the defendants, ANTHONY OZZANTO and BERNARD POZNER, did in a 1964 black Ford, license no. MGZ 890, follow Philip Feldstein, from Loman's Jewelers to the 200 block of Brand Boulevard in the City of Glendale.

OVERT ACT NO. VII

That thereafter on February 3, 1971, the defendant BERNARD POZNER and the defendant ANTHONY OZZANTO did get out from the 1964 black Ford, license no. MGZ 890 at and in the vicinity of the 200 block of Brand Boulevard in the City of Glendale.

OVERT ACT NO. VIII

That on February 3, 1971, the defendant BERNARD POZNER had in his possession a gold-colored key fitting the trunk of the Chrysler automobile driven that day by Philip Feldstein.

OVERT ACT NO. IX

That on February 3, 1971, the defendant ANTHONY OZZANTO and the defendant BERNARD POZNER did have in their possession certain tools and keys.

COUNT II

For a further and separate cause of action, a different offense of the same class of crimes and offenses as the charges set forth in all other counts of this Indictment, the said Anthony Ozzanto and Bernard Pozner are accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Grand Theft in Violation of Section 487(1), Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

That on or about the 12th day of May, 1970 at and in the County of Los Angeles, State of California, the said defendants, Anthony Ozzanto and Bernard Poz-

ner did willfully, unlawfully and feloniously take the property of another of a value exceeding Two Hundred Dollars ($200.00).

COUNT III

For a further and separate cause of action, being a different offense of the same class of crimes a different statement of the same offense set forth in Count II hereof, the said Anthony Ozzanto and Bernard Pozner are accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Burglary in Violation of Section 459, Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

That on or about the 12th day of May, 1970 at and in the County of Los Angeles, State of California, the said defendants, Anthony Ozzanto and Bernard Pozner did willfully, enter a motor vehicle, to wit, a 1968 Ford automobile, the property of Behar Issac Azicre, the doors and trunk of said motor vehicle being locked, with the intent then and there and therein unlawfully and feloniously to commit theft.

COUNT IV

For a further and separate cause of action, being a different offense of the same class of crimes offenses as the charges set forth in all counts of this Indictment, the said Anthony Ozzanto and Bernard Pozner are accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Grand Theft in Violation of Section 487(1),

Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

That on or about the 24th day of November, 1970, at and in the County of Los Angeles, State of California, the said defendants, Anthony Ozzanto and Bernard Pozner did willfully, unlawfully and feloniously take the property of another of a value exceeding Two Hundred Dollars ($200.00).

COUNT V

For a further and separate cause of action, being a different offense of the same class of crimes and a different statement of the same offense set forth in Count IV hereof, the said Anthony Ozzanto and Bernard Pozner are accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Burglary in Violation of Section 459, Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

That on or about the 24th day of November, 1970 at and in the County of Los Angeles, State of California, the said defendants, Anthony Ozzanto and Bernard Pozner did willfully, enter a motor vehicle, to wit, a 1970 Chevrolet automobile, the property of Leon Chatillon, the doors and trunk of said motor vehicle being locked, with the intent then and there and therein unlawfully and feloniously to commit theft.

COUNT VI

For a further and separate cause of action, being a different offense of the same class of crimes and of-

fenses as the charges set forth in all other counts of this Indictment hereof, the said Anthony Ozzanto and Bernard Pozner accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Attempted Grand Theft in Violation of Section 664/487, subdivision 1, Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

That on or about and between the 1st and 30 day of November, 1970 at and in the County of Los Angeles, State of California, the said defendant Anthony Ozzanto and Bernard Pozner did willfully, unlawfully and feloniously attempt to take the property of another of a value exceeding Two Hundred Dollars ($200.00).

COUNT VII

For a further and separate cause of action, being a different offense of the same class of crimes and a different statement of the same offense set forth in Count VI hereof, the said Anthony Ozzanto and Bernard Pozner accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Attempted Burglary in Violation of Section 664/459, Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

That on or about and between the 1st and 30th day of November, 1970, at and in the County of Los Angeles, State of California, the said defendants Anthony Ozzanto and Bernard Pozner did willfully, unlawfully and feloniously attempt to enter a motor vehicle, to wit, a 1970 Cadillac automobile, the property

of Harry Judis, the doors and trunk of said motor vehicle being locked, with the intent then and there and therein unlawfully and feloniously to commit theft.

WITNESSES

ELAINE HUNTER
PHILIP FELDSTEIN
ROBERT ROLLINS
CHARLES D. O'CONNELL
JACOB PFAFF
PAUL FRANK
EDWARD RUGGLES
AL ROSE
ISSAC AZICRE BEHAR
DON DE COY
HARRY JUDIS
LEON CHATILLON
BOB HASTY
ANDREW VALDEZ
PRECHA CHENG
TOM EDMONDS
L. T. BLAKE

A TRUE BILL
/s/ Leo D. Epstein
Foreman of the Grand Jury

Presented by the Foreman of the Grand Jury, in the presence of the Grand Jury, in open Superior Court of the State of California, within and for the County of Los Angeles, and filed as a record in said Court this 5th day of May, 1971.

WILLIAM G. SHARP, County Clerk
/s/ By A. J. Antenorcruz
Deputy

Bail Recommended
$10,000 Each

APPENDIX D.

Motion of Defendants to Set Aside Counts I Through VII of the Indictment Under Section 995 of the Penal Code (This Motion Has Been Set for a Hearing in Department 108 on July 23, 1971 at 9 AM).

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff vs. Anthony Ozzanto and Bernard Pozner, Defendants.

To the Honorable Kathleen Parker, Judge of the Superior Court for the County of Los Angeles, State of California:

Defendants ANTHONY OZZANTO and BERNARD POZNER, each separately for himself, moves to set aside Counts I through VII of the Indictment filed in this action.

Said Motions are made as to each Count separately on the grounds that the defendant has been indicted without reasonable or probable cause.

Said Motions are made and based on this Notice of Motion, on the Reporter's Transcript of the testimony presented before the Grand Jury, upon the "Memorandum Brief and Points and Authorities In Support of Motion under Penal Code Section 995" Served and filed herewith, on all the papers, documents and files of these proceedings, and on such oral and documentary evidence as may be presented at the time of the hearing of this Motion.

DATED: July 22, 1971.

/s/ Alvin Hirsch
ALVIN HIRSCH
Attorney for Defendants
Anthony Ozzanto and Bernard Pozner

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Supreme Court, U. S.
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APR 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-942

ANTHONY OZZANTO and BERNARD POZNER,
Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,
Respondents,

THE PEOPLE OF THE STATE OF CALIFORNIA BY THEIR ATTORNEY, JOSEPH P. BUSCH, DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,
Real Party in Interest.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Brief of Real Party in Interest in Opposition.

JOSEPH P. BUSCH,
District Attorney of Los Angeles County,
HARRY WOOD,
Head, Appellate Division,
ARNOLD T. GUMINSKI,
Deputy District Attorney,
849 South Broadway,
Los Angeles, Calif. 90014,
Attorneys for Real Party in Interest.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Real Party in Interest.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Brief of Real Party in Interest in Opposition.

Statement of the Case.

Petitioners were indicted in Case No. A-272 820 in the Superior Court of the State of California for the County of Los Angeles for having allegedly conspired to commit grand theft and burglary and for having committed and attempted to commit grand theft and burglary. (See Petition, Appendix C, pp. 3-9.) On September 20, 1971, Petitioners' motions under sections 995 and 1538.5 of the California Penal Code were denied by the Superior Court.[1] The Court of Appeal for

[1]Pertinent portions of sections 995 and 1538.5 are set forth in the Petition at pages 4-5 and 6-7, respectively.

the State of California, Second Appellate District, denied without opinion a petition for a writ of prohibition/mandate on October 29, 1971. On November 24, 1971, the California Supreme Court denied without opinion a petition for hearing. On January 20, 1972, a petition for a writ of certiorari was filed in this Court "to review the Judgment of the Court of Appeal of the State of California, Second Appellate District, entered in this case on October 29, 1971." (Petition, p. 1.) This Court has directed that a response be filed in this case on or before April 17, 1972.[2]

Petitioners erroneously state that "the decision below not to dismiss the indictment is based upon the principle that illegally seized evidence may be the basis of an indictment." (Petition, p. 17.) The most Petitioners can claim is that the Superior Court denied the motions under California Penal Code sections 995 and 1538.5 because it had erroneously determined that evidence which constituted the basis of the indictment had not been illegally seized. This is, of course, an entirely different matter.

This Court Lacks Jurisdiction to Hear This Matter.

Both California Penal Code sections 995 and 1538.5 pertain to pretrial proceedings in a criminal case. Neither the denial without opinion of a petition for a writ of prohibition/mandate by the Court of Appeal of the State of California, Second Appellate District, nor the denial without opinion of a hearing by the California Supreme Court constituted a conclusive decision on the merits.

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[2]Although the Clerk of this Court requested the Attorney General of the State of California to file a response, it is the District Attorney of the County of Los Angeles who is the attorney of record for the real party in interest. For that reason, the latter will file this response.

Indeed, "It is settled law that an appellate court's action denying without opinion a petition for a writ of mandate or prohibition is not the determination of a 'cause' requiring oral argument and a written opinion." (*People v. Medina*, 6 Cal.3d 484, 490, 492 P.2d 686, 689.) Furthermore, "The denial without opinion of a petition for a writ of mandate or prohibition is not res judicata except when the sole possible ground of denial was on the merits or it affirmatively appears that the denial was intended to be on the merits." (*Id.*, 6 Cal.3d at 491 (footnote 6); 492 P.2d at 690.)

Manifestly, Petitioners have erroneously invoked the jurisdiction of this Court under 28 U.S.C. Section 1257(3) because there has been no "[f]inal judgment or decree rendered by the highest court of a State in which a decision could be had, . . ." (See *Whitus v. Georgia*, 385 U.S. 545, 546-547, 17 L.Ed.2d 599, 602, 87 S.Ct. 643; *Chapman v. California*, October Term, 1971, No. 71-615, 40 L.W. 3467.)[3]

Finally, even if it should be deemed that the denial of the petition for writ of prohibition/mandate by the Court of Appeal of the State of California, Second Appellate District, constituted a final judgment or decree within the meaning of 28 U.S.C. Section 1257(3), we respectfully urge that the instant case, which involves

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[3]Because this Court in *Chapman* denied the petition for a writ of certiorari, "[i]t appearing that the state court decision is not final," although a writen opinion was rendered by a California appellate court respecting pretrial litigation of search and seizure issues in an obscenity case, there is all the more reason to conclude that the petition for a writ of certiorari should be denied in the instant case where the appellate courts did not render written opinions. It should be noted that *Chapman*, as does the instant case, does not involve a situation where denial of review would effectively foreclose this Court's later consideration of a federal claim. (Compare, *California v. Stewart*, 383 U.S. 436, 498 (footnote 71), 16 L.Ed.2d 694, 86 S.Ct. 1602.)

a pending criminal prosecution set for trial, is not appropriate for a present review on writ of certiorari. Rule 19, Rules of the Supreme Court of the United States. See *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 699, 91 S.Ct. 746; *Samuels v. Mackell*, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764; *Boyle v. Landry*, 401 U.S. 77, 27 L.Ed.2d 696, 91 S.Ct. 758; *Perez v. Ledesma*, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674.

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOSEPH P. BUSCH,
District Attorney of Los Angeles County,

HARRY WOOD,
Head, Appellate Division,

ARNOLD T. GUMINSKI,
Deputy District Attorney,

Attorneys for Real Party in Interest.

IN THE

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Real Party in Interest.

Petitioners' Reply Brief in Support of Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

ALVIN HIRSCH,
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Real Party in Interest.

Petitioners' Reply Brief in Support of Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Statement of the Case.

The procedural history and statement of facts in this case are fully set forth in the Petition for a Writ of Certiorari herein, pages 1-13.

Petitioners submit the following points in reply to the arguments raised by the brief of the Real Party in Interest, Joseph P. Busch.

This Court Has Jurisdiction to Hear This Matter.

A final judgment has been rendered which is now reviewable by this Court. This action is based upon a proceeding for a Writ of Prohibition. That Writ has been denied, as was hearing by the California Supreme Court.

A decision of the highest state court which finally disposes of a Writ of Prohibition is a final judgment, reviewable by this Court. *Madruga v. Superior Court*, 346 U.S. 556; *Rescue Army v. Municipal Court*, 331 U.S. 549; *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8.

A prohibition proceeding is a separate and independent suit, relative to the underlying criminal prosecution, and a judgment denying the writ of prohibition is final. *Bandini v. Superior Court*, 346 U.S. 556; *Rescue Army v. Municipal Court*, 331 U.S. 549. Even a denial of the writ without opinion is final and reviewable by this Court. *Michigan Central Railroad Company v. Mix*, 278 U.S. 492.

This Is an Appropriate Case for Consideration Upon Writ of Certiorari.

The brief of the Real Party in Interest cites four cases for the proposition that this case "is not appropriate for a present review on writ of certiorari". None of those cases, however, considered the appropriateness of review by writ of certiorari. Rather, they all held that a Federal District Court action for an injunction or declaratory judgment prohibiting prosecutions by state officials is not appropriate except in extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37; *Samuels v. Mackell*, 401 U.S. 66; *Boyle v. Landry*, 401 U.S. 77; *Perez v. Ledesma*, 401 U.S. 82.

The Court, in *Perez v. Ledesma,* said that ". . . such federal interference with a state prosecution is improper. The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals . . . *subject, of course, to review by certiorari or appeal in this Court* or, in a proper case, on federal habeas corpus". *Perez v. Ledesma,* 401 U.S. 82, 84-85. (Emphasis added.) Petitioners here seek precisely such review by certiorari, and not an injunction. Their Petition for such a writ is appropriate.

For the above reasons, Petitioners respectfully request that their petition be granted.

Respectfully submitted,

ALVIN HIRSCH,
Counsel for Petitioners.